

Issue: Group III Written Notice with termination (fraternization); Hearing Date: 05/06/04; Decision Issued: 05/10/04; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 667



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 667

Hearing Date: May 6, 2004
Decision Issued: May 10, 2004

PROCEDURAL ISSUES

During the second resolution step meeting, grievant voluntarily resigned from state employment February 11, 2004.¹ Subsequently, on February 23, 2004, grievant requested to rescind her resignation and have her grievance proceed to a hearing. The agency agreed to qualify the grievance for a hearing and the case was forwarded to the Department of Employment Dispute Resolution for assignment to a hearing officer.

Near the end of the hearing, grievant's attorney objected to some of the hearing officer's questions to grievant.² The hearing officer advised the attorney that the

¹ Exhibit 1, Grievant's resignation letter, February 11, 2004.

² See *Goldberg's Deskbook on Evidence for Administrative Law Judges* (1993), which explains that unlike civil and criminal trials, an administrative law hearing is conducted with the notion that administrative agencies are not bound by the formal rules of evidence. See generally *Manual for Administrative Hearing Officers*, Office of Adjudication, Department of Consumer and Regulatory Affairs (1988), which explains that hearing officers have three roles in the hearing process – adjudicating the case, assisting unrepresented parties in the presentation of their case, and fact finding. Even when both parties are represented, the hearing officer has a duty to elicit vital and necessary information to make a complete record. Thus, a hearing officer may ask questions to obtain evidence that is relevant, probative, or that tests the credibility of a witness.

grievance procedure provides remedies if a party alleges noncompliance with the hearing or grievance procedure.³

APPEARANCES

Grievant
Attorney for Grievant
Warden Senior
Advocate for Agency
Six witnesses for Agency

ISSUES

Did grievant's conduct warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group III Written Notice issued for fraternization with an inmate.⁴ Grievant was subsequently removed from employment as part of the disciplinary action. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.⁵ The Department of Corrections (DOC) (Hereinafter referred to as "agency") had employed grievant for six years. She was a Corrections Officer Senior.

Agency policy prohibits improprieties or the appearance of improprieties, fraternization or other nonprofessional association between staff and inmates which may compromise security or which undermines the employee's effectiveness to carry out her responsibilities.⁶ Such a violation may be treated as a Group III offense.

On January 1, 2004, a female corrections officer decided to retrieve a bottle of water from a refrigerator in the faculty lounge of the education building. She met the male corrections officer responsible for security in the area and he unlocked the door of the hallway outside the lounge. As the male officer was locking the door, the female officer pushed on the lounge door but encountered resistance because the door was

³ §§ 6.4 & 7.2, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

⁴ Exhibit 1. Written Notice, issued January 28, 2004.

⁵ Exhibit 2. Grievance Form A, filed January 30, 2004.

⁶ Exhibit 4. Agency Procedure Number 5-22.7.A.1, *Rules of Conduct Governing Employees' Relationships with Inmates, Probationers, or Parolees*, June 1, 1999, states: Improprieties or the appearance of improprieties, fraternization, or other non-professional association by and between employees and inmates, probationers, or parolees or families of inmates, probationers, or parolees is prohibited. Associations between staff and inmates, probationers, or parolees which may compromise security or which undermine the employee's effective to carry out his responsibilities may be treated as a Group III offense under DOC Procedure 5-10, *Standards of Conduct*.

blocked from inside the lounge. The door has a window through which the female officer was able to see that an inmate was holding the door shut.⁷ She remarked to the male officer that inmate A was in the lounge, and told the inmate she wanted to retrieve a bottle of water from the refrigerator. The inmate opened the lounge door enough to pass the water bottle to the female officer. The female officer and the male officer then left the area.

When the female officer attempted to enter the lounge, she claims that the windowless room was dark because the lights were off. She also claimed that when the refrigerator opened, its light came on and she saw a pair of boots and a state-owned radio lying on the floor. When the inmate opened the lounge door to pass out the water bottle, the female officer claimed she detected “an odor that smelled like someone had been or was having sex.”⁸ During an investigative interview, the inmate admitted to being in the darkened lounge with grievant. In his first statement to an investigator, he contended that he was consoling grievant because she was upset about something. In his second statement, the he asserted that he was having sex with grievant.

On January 1, 2004, at about 12:10 p.m., grievant accompanied an elderly inmate (90 years of age) to the medical department. Because he moved so slowly the walk took about ten minutes and grievant remained with him for about another 15 minutes during his medical visit. The inmate then went to the dining hall. Grievant went to the rest room, then got a snack from a vending machine, and then went to the education building. There she met inmate A, who asked her to help him carry boxes containing soap and toilet paper back to his housing unit. Grievant and inmate A then returned to his housing unit at sometime between 12:35 and 12:45 p.m. At about 12:50 p.m., grievant was asked to accompany a different inmate to the medical department. She did so and was with that inmate until he returned to the housing unit approximately 50 minutes later.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee’s ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth’s grievance procedure and provides, in pertinent part:

⁷ The inmate had come to the area to clean, wax and buff floors – his regular job assignment in that area.

⁸ Exhibit 2. Female officer’s *Investigative Interview*, January 13, 2004.

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.⁹

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management (DHRM) promulgated Standards of Conduct Policy No. 1.60. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Section V.B.3 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment.¹⁰ The Department of Corrections (DOC) has promulgated its own Standards of Conduct patterned on the state Standards, but tailored to the unique needs of the Department. Section 5-10.17 of the DOC Standards of Conduct addresses Group III offenses, which are defined identically to the DHRM Standards of Conduct.¹¹ Violation of DOC Procedure 5-22 is one example of a Group III offense.

The agency has not borne the burden of proving by a preponderance of evidence that grievant fraternized with an inmate. The agency has not produced a single witness to testify that grievant was in the lounge on January 1, 2004. The only evidence placing grievant in the lounge are unsworn interviews of the inmate with whom grievant is alleged to have been in the lounge. That inmate produced two very different statements – first claiming that he was consoling grievant, and then claiming that they were having sex on the table. The inconsistency in his statements severely taints his credibility. Moreover, the agency failed to offer this inmate as a witness. When one party fails to produce a key witness, it must be presumed that his testimony would not be favorable to that party. In this case, it must be assumed that his testimony would be no more credible than his inconsistent written statements.

⁹ § 5.8 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

¹⁰ DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

¹¹ Exhibit 5. Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

The only witness who alleges that there *may* have been someone in the lounge with the inmate does not get along with grievant because of the witness' disclosure in the workplace of personal information about grievant.¹² This witness also failed to testify. Even though the witness no longer works for the agency, the agency did not request an order be issued for her attendance at the hearing. In any case, this witness's written statement does not say that she observed anyone other than the inmate in the lounge. In fact, her statement does not make any mention, directly or indirectly, of the grievant. She claims that she saw a radio and small-size boots on the lounge floor.¹³ However, these boots could have belonged to either a female or a male.¹⁴

Another male officer to whom the female officer told her story maintains that she told him that the male officer who unlocked the hall door said that grievant was in the lounge with the inmate. However, the male officer who unlocked the door credibly testified he had no such conversation with the female officer. As the female officer had reason to dislike grievant, it is more likely than not that her allegation is not credible.

In contrast to the less than credible statements of the inmate, and the hearsay statements of second- and third-hand witnesses, some of whom contradict each other, grievant has denied being in the lounge with the inmate at any time on the day in question. She has acknowledged that she did help him carry supplies from the education building to the housing unit. Moreover, grievant has offered evidence, unrebutted by the agency, to account for her whereabouts from approximately 12:10 p.m. to 1:40 p.m. In fact, the agency's evidence corroborates her account in part.¹⁵ The agency did not offer any evidence to show that grievant did not accompany two inmates to the medical unit. The agency did not call the two inmates to rebut her testimony. Failure to call these witnesses in rebuttal raises a presumption that their testimony would not have been favorable to the agency.

The agency offered evidence to show that it was unusual for additional supplies to be obtained from another building since the buildings have regular resupply days. However, the evidence as to how much soap and toilet paper was already in the housing unit is contradictory. The agency's witness contends that there was an adequate supply; grievant contends the supply was significantly low. Neither party provided corroborative evidence one way or the other. Even if the resupply was unusual, the agency has not rebutted grievant's assertion that she was merely assisting the inmate at his request. It is possible, as the agency contends, that the inmate did not have authorization to obtain more supplies. However, the inmate may have had his own agenda for getting the supplies which he never disclosed to grievant.

¹² The disclosure occurred approximately one year ago.

¹³ Grievant wears size 11 boots.

¹⁴ In this day and age, one cannot assume that the inmate would have been engaged in sex only with a female. Given the reputation of incarcerated males, it is just as likely that he could have been with a male as with a female. Obviously, some males wear smaller-size boots. One can also not rule out the possibility that if the inmate was having sex, he was alone.

¹⁵ Exhibit 1. Email from sergeant to captain, January 2, 2004.

The time lines were not established with any certainty during the investigation. Several written statements either contain no times, or are somewhat imprecise about times. The key witness in this case – the inmate – did not include in either of his written statements the time that he was allegedly in the lounge. However, the male officer states that the inmate first arrived in the education building to begin cleaning at about 1:15-1:30 p.m. He further states that the female officer did not arrive to retrieve her water bottle until 30-40 minutes later. Therefore, according to this agency witness, the inmate was first discovered in the lounge no earlier than 1:45 – 2:10 p.m. On the other hand, the female officer claims she saw the inmate in the lounge “right after the noon count,” – which was completed prior to 12:00 noon.¹⁶ Thus, there is nearly a two-hour discrepancy in the times provided by two key agency witnesses.

The sergeant’s investigation revealed that grievant and the inmate returned to the housing unit with bathroom supplies at about 1:40 p.m. and that grievant was conducting a security check at 2:00 p.m.¹⁷ Accordingly, the agency’s own evidence establishes that the alleged incident could not have occurred earlier than 1:45 – 2:10 p.m., and that during this time period, grievant was back in the housing unit putting supplies in the storage closet and beginning a security check.¹⁸

In summary, the information provided by agency witnesses and evidence satisfactorily corroborates grievant’s account of her whereabouts during the time she was alleged to have been in the lounge. Grievant’s sworn denial that she was in the lounge outweighs the less-than-credible unsworn, contradictory written statements of the inmate. The remaining evidence in this case is imprecise, contradictory, and circumstantial. No one who testified actually saw grievant in the lounge at any time. Therefore, the agency has not borne the burden of proving that grievant engaged in an impropriety or the appearance of an impropriety.

Grievant proffered as evidence a “Deputy’s determination” of the Virginia Employment Commission. Such evidence is inadmissible in any judicial or administrative proceeding other than one arising out of the provisions of Title 60.2 and, therefore, is inadmissible in this grievance hearing. The hearing officer retained the document as a rejected exhibit.¹⁹

¹⁶ The testimony of a captain established that the noon count of inmates began at 11:30 a.m. and was completed prior to 12:00 noon.

¹⁷ Exhibit 1. Email from sergeant to captain, January 2, 2004.

¹⁸ NOTE: One inconsistency could not be resolved. Grievant avers that she and the inmate brought the supplies to the housing unit at about 12:40 p.m.; the sergeant’s investigation indicates that they brought the supplies at about 1:40 p.m. In either case, however, grievant was back in the housing unit well before the inmate was first observed in the lounge at sometime between 1:45 and 2:10 p.m.

¹⁹ Va. Code § 60.2-623.B. NOTE: Even if the law did not prohibit admission of such evidence, a deputy’s determination would be accorded little or no evidentiary weight since it represents only the results of an interview conducted by the deputy with the grievant and/or the employer. The interview is not a due-process evidentiary hearing and the information obtained from the interviewees is not under oath.

DECISION

The decision of the agency is reversed.

You may request a judicial review if you believe the decision is contradictory to law.²⁰ You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.²¹

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant]

David J. Latham, Esq.
Hearing Officer

²⁰ An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

²¹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.